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Supreme Court of the United States
OCTOBER TERM, 1942.
No. 300

HOWARD S. PALMER, HENRY B. SAWYER and
JAMES LEE LOOMIS, as Trustees for The New
York, New Haven and Hartford Railroad Company,
Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of
Inez Hoffman, also known as Inez T. Spraker Hoffman,
deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

EDWARD R. BRUMLEY,
Counsel for Petitioners.

R. J. SEIFERT,
A. G. KUHBACH,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No.

HOWARD S. PALMER, HENRY B. SAWYER AND JAMES LEE
LOOMIS, as Trustees for The New York, New Haven
and Hartford Railroad Company,

Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Administrator
of the goods, chattels and credits which were of Inez
Hoffman, also known as Inez T. Spraker Hoffman,
deceased,

Respondent.

Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit:

The petitioners, Howard S. Palmer, Henry B. Sawyer
and James Lee Loomis, as Trustees for The New York,
New Haven and Hartford Railroad Company, pray that
a writ of certiorari issue to review the decree of the
Circuit Court of Appeals for the Second Circuit entered
in the above cause on July 15, 1942, affirming a judgment
of the District Court of the United States for the Eastern
District of New York, and respectfully represent:

THE OPINIONS OF THE COURT BELOW.

There was no opinion of the trial court. The majority
and dissenting opinions in the Circuit Court of Appeals
for the Second Circuit have not yet been reported but
appear at pages 513 to 561 of the Record. The amended
majority and dissenting opinions appear at pages 565 to
570 of the Record.

JURISDICTION.

1. The jurisdiction of this Court is invoked under §240, subdivision (a), of the Judicial Code, as amended by the Acts of February 13, 1923, c. 229, §1, 43 Stat. 938; of January 31, 1928, c. 14, §1, 45 Stat. 54; and of June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. A. §347. (a).
2. The decree of the Circuit Court of Appeals, entitled Order for Mandate, sought to be reviewed, is dated July 15, 1942 (R. 562, 563). This decree affirms the judgment of the District Court.

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*; pages 19 to 22, inclusive.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The complaint alleges that on December 25, 1940, at about 6:15 p. m., while the plaintiff (respondent) Howard F. Hoffman was driving a Ford coupe at a grade-crossing in West Stockbridge, Massachusetts, the automobile was struck by a locomotive engine operated by the defendants (petitioners), causing injuries to the plaintiff and the death of his wife, Inez F. Hoffman (R. 5, 6, 13). The jurisdiction of the United States District Court for the Eastern District of New York was based on diversity of citizenship (R. 4, 5, 40).

The First Cause of Action, on behalf of Howard F. Hoffman, brought under a statute of Massachusetts, alleges defendants were negligent in failing to ring a bell or blow a whistle on the engine (R. 7, 8). It also sets out that plaintiff reduced speed, thereafter did stop,

look and listen, and did then proceed cautiously over the crossing, in compliance with another statute of Massachusetts (R. 9).

The Second Cause of Action, also on behalf of Howard F. Hoffman, is based on the common law, and alleges defendants were negligent in failing to ring a bell or blow a whistle, in failing to have a headlight on the rear end of the locomotive, in operating the locomotive with its headlight away from the crossing, and in certain other respects immaterial to this petition (R. 9-12).

The Third and Fourth Causes of Action, brought by Howard F. Hoffman as administrator of the estate of Inez Hoffman, allege negligence of defendants as to bell and whistle, and negligence under a statute of Massachusetts (R. 12-15). The Fifth and Sixth Causes of Action were discontinued (R. 39).

On the issue of negligence the trial court submitted three questions to the jury—failure to ring a bell, failure to blow a whistle, and failure to have a light burning on the front of the train (R. 421, 423, 426, 427).

Judgment was entered in favor of the plaintiff, Howard F. Hoffman, individually, in the amount of \$25,077.35, and in favor of Howard F. Hoffman, as Administrator of the Estate of Inez Hoffman, in the amount of \$9,000.00 on November 25, 1941 (R. 500, 501).

In the District Court, a statement of defendants' engineer, who had died prior to the trial (R. 271), was offered in evidence under 28 U. S. C. A. §695. (Defendants' Exhibit J for Identification, R. 496-499.) The plaintiff objected, the court sustained the objection and defendants excepted (R. 420, 421). The Circuit Court of Appeals held that even though the defendants offered proof that the statement was made in the regular course of business and that it was the regular course of such business to make the statement, the statement was inadmissible (R. 535, 536).

Plaintiff's witness Lawrence Bona, testified that he gave a statement to Mr. Diamond (R. 100, 101). The trial court ruled that if the attorney for the defendants called for it and looked at it, it would open the door for the plaintiff to offer the statement in evidence, and if that were done, the court would receive it (R. 125, 233). The Circuit Court of Appeals held unanimously that this constituted error, but the majority opinion says it was not reversible error because (1) as the statement was not in the record it was impossible to say whether it would have served for impeaching purposes, and whether it would have led to such an impeachment of the witness as materially to affect the jury's verdict; and because (2) it cannot be said that the trial judge was unreasonable in relying upon *Edison Electric Light Co. v. United States Electric Lighting Co.*, 45 Fed. 55 (R. 530, 560, 561). Plaintiff's attorney produced the statement, but made no objection to its inspection and no claim that it was irrelevant or a confidential communication (R. 125). Other witnesses called by the plaintiff had given signed statements to the attorney for plaintiff (R. 173, 209, 222). Because of the ruling, these were not called for.

In its charge, the trial court said that the defendants had the burden of proving contributory negligence (R. 428). This was contrary to defendants' request No. 16 that in the personal injury action the plaintiff had the burden of proving freedom from contributory negligence (R. 448). Defendants excepted to the charge, and to the failure to charge defendants' request No. 16, as to burden of proof (R. 437). The Circuit Court of Appeals affirmed the action of the District Court (R. 532).

THE QUESTIONS PPOSED.

- (1) Whether the Circuit Court of Appeals improperly read into the Act of June 29, 1898, c. 640, (1, 49 Stat. 1361; 28 U. S. C. A. §493), a restriction which supported the trial court's exclusion of a stenographic report of the engineer's examination, offered by the defendants, even though the statement was signed in the regular course of business and it was the regular course of business to make such statement.
- (2) Whether the Circuit Court of Appeals improperly refused to treat as reversible error the denial of defendants' admitted right to demand and inspect, without any condition attached, a statement made by plaintiff's witness, unless it appeared that the statement could be used for purposes of such successful impeachment as materially to affect the jury's verdict.
- (3) Whether in diversity of citizenship cases the federal courts must follow conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8 (c).

SPECIFICATION OF REASONS.

The Circuit Court of Appeals erred:

1. In holding that the statement of defendants' engineer was not admissible in evidence under 28 U. S. C. A. §493.
2. In holding that the admittedly erroneous ruling of the District Court, that upon demand for and inspection by defendants' attorney of a statement made by plain-

tiff's witness, the statement was admissible in evidence, was not reversible error.

3. In holding that the burden of proving contributory negligence was on the defendant.
4. In affirming the judgment of the District Court.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

The petitioners contend that the writ of certiorari should be granted for the following reasons:

1. *The decision of the Circuit Court of Appeals as to the application and interpretation of 28 U. S. C. A. §695 raises an important question of federal law which has not been, but should be, determined by this Court.*

The Circuit Court of Appeals has decided that the engineer's statement (Defendants' Exhibit J for Identification, R. 496-499) was not admissible under 28 U. S. C. A. §695. This statute reads as follows:

"ADMISSIBILITY. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not

affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

Defendants offered to prove that the statement was made in the regular course of business and that it was the regular course of business to make such statement (R. 420, 421). The plaintiff's attorney objected to the statement without giving any grounds, and the trial court sustained the objection to the introduction of the statement without giving any reasons (R. 420, 421). In the opinion of Circuit Judge Frank the statement was inadmissible, even though the proof fulfilled the statutory conditions (see dissenting opinion of Circuit Judge Clark, R. 554). Circuit Judge Frank seems to think that proof of "regular course of business" would have shown "a regular practice of making records with the purpose of supplying evidence in a highly probable law suit" (R. 522), "an obviously motivated record" (R. 539), and that "the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents" (R. 541). He concludes: "But the engineer's statement is in the record, and we know, from the evidence, that the engineer was a party to the accident. No proof, then, was possible that he did not have the peculiarly strong motive to misrepresent of the kind which, we hold, precludes its admission" (R. 543). This reads into the statute a restriction not expressed, and reads out of the statute the clause: "all other circumstances of the making of such writing or record * * * may be shown to affect its weight, but they shall not affect its admissibility."

The majority opinion argues that the words "regular course of business" in the statute should be given the settled meaning which it is claimed they had at common

law (R. 523, 525), and that the principle of circumstantial guarantee of trustworthiness is inherent in all exceptions to the hearsay rule (R. 519). The dissenting opinion argues that the restriction read into the statute is directly opposed to its intent, its history and background, and to the views of Wigmore and Morgan (R. 553, 554). The dissenting opinion also argues that the restriction is not precise, is against the trend of the times, and shows a new technique of judicial legislation (R. 553, 556, 557).

The scope of the decision is obviously very broad. To quote Circuit Judge Clark:

"The limitation here added to the statute goes beyond anything I know of in any state or federal precedents on this uniform and model statute and clearly must interdict such normal things as reports of accidents or even passenger disputes made regularly by street railway motormen or bus operators and, logically, even the judicially quite familiar log of a ship at sea (R. 555). * * * this is not a statute limited to evidence in jury trials * * * but one applicable to all courts of the United States, bankruptcy, claims, customs and patent appeals, or even administrative courts (R. 558) * * *. I submit that there is hardly a grocer's account book which could not be excluded on that basis" (R. 560).

Not only does the decision apply to many situations, bound to recur frequently, but "the failure to define the extent of the restriction makes the result a portent of future trouble" (dissenting opinion of Circuit Judge Clark, R. 560).

According to Circuit Judge Frank, to make a statement admissible under the statute, there must be no more than a minimal motive to misrepresent (R. 515), and a statement is not admissible if made by a party to the acci-

dent (R. 543). No statement made by an employee, under standing orders from his employer to make reports of accidents in which the employee is a participant, is admissible, for Circuit Judge Frank thinks it is obvious that the primary purpose of the employer is to use such statement in litigation (R. 541).

Circuit Judge Clark makes this criticism:

"I think we are justified in asking for some more precise formulation of the restriction than is stated in the opinion * * *. I find both rationale and restriction vague and nebulous" (R. 555, 556).

We urge that the decision is contrary to the express provisions of the statute, that the scope of the decision is very broad, that it lacks preciseness of application in the administration of the statute, and that the problem will recur frequently in many courts. We have here a question of federal law more important even than that which served as a basis for the granting of the writ in *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1941), involving Federal Rules of Civil Procedure 35 and 37.

2. The decision of the Circuit Court of Appeals on a federal question, as to the application and interpretation of 28 U. S. C. A. §695, is in conflict with the decisions of this Court insofar as they have a bearing upon the question here presented and is erroneous.

The opinion of Circuit Judge Frank construes the statute to mean that even if the engineer's statement fulfilled the statutory conditions, it was not admissible because it was "dripping with motivations to misrepresent" (R. 535, 536). He says that "the statute does not permit the introduction in evidence of a hearsay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the

memorandum or report knows at the time of making it that he is very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability" (R. 536). Thus the opinion reads into the act a restriction which is "directly opposed to the intent of the statute, as shown by its plain terms" (Circuit Judge Clark's dissenting opinion, R. 553).

The appeal was argued May 7, 1942, the original opinions were handed down on June 23, 1942 (R. 513), and an order was issued on July 31, 1942, amending the majority and dissenting opinions (R. 565-570). Circuit Judge Frank has added quotations from a letter of the Attorney General to the Chairman of the Senate Judiciary Committee, and a memorandum enclosed with the letter, for the purpose of showing the limited objective at which Congress was driving (R. 565). Circuit Judge Clark makes a quite different interpretation and characterizes the majority position as a "completely stultifying addition here made to the statute" (R. 570). This is not the place to go into detail as to the merits of this controversy. Both the original and amended opinions, majority and dissenting, show diametrically opposed interpretations of a federal statute.

The Circuit Court of Appeals, by inserting restrictions into §695, particularly "regular course of business", even though the words of the statute are clear and unambiguous, has rendered a decision in conflict with decisions of this Court which adhere to a well-recognized and fundamental rule of statutory construction. Chief Justice Marshall, in *United States v. Wiltberger*, 5 Wheat. 76 (1820), said (pp. 95, 96):

"Where there is no ambiguity in the words, there is no room for construction."

The rule was again stated in *United States v. Hartwell*, 6 Wall. 385, 396 (1867) :

"If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction."

A few of the many other decisions of this Court which hold that language construction does not come into play without ambiguity of language are: *Lewis v. United States*, 92 U. S. 618, 621 (1875); *Lake County v. Rollins*, 130 U. S. 662, 670 (1889); *Hamilton v. Rathbone*, 175 U. S. 414, 419-421 (1899); *Thompson v. United States*, 246 U. S. 547, 551 (1918); *Russell Co. v. United States*, 261 U. S. 514, 519 (1923); *Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).

3. *The decision of the Circuit Court of Appeals, that it was harmless error for the trial court to hold that, upon demand for and inspection by defendants' attorney of a statement made by plaintiff's witness, it was admissible in evidence, presents important questions of Federal law which have not been, but should be, determined by this Court.*

The trial court ruled that if defendants' attorney called for and inspected a statement made by plaintiff's witness Lawrence Bona it would be admissible in evidence for the plaintiff (R. 253). The Circuit Court of Appeals held unanimously that this was error, but the majority opinion says it was not reversible error because (1) as the statement was not in the record it was impossible to know whether it would have served for impeaching purposes,

and whether such impeachment would have materially affected the jury's verdict; and because (2) it could not be said that the trial judge was unreasonable in relying upon *Edison Electric Light Co. v. United States Electric Lighting Co.*, 45 Fed. 55 (C. C., S. D. N. Y., 1891) *supra*, (R. 550, 560, 561). The failure of the Circuit Court of Appeals to set aside the verdict below imposes on the right to demand and inspect documents conditions (viz., that the documents be before the court so that it can determine whether they will serve as a basis for impeachment and whether such impeachment will materially affect the jury's verdict) which are contrary to the intent of the Federal Rules of Civil Procedure.

The majority opinion says that the trial judge should have dealt with the defendants' attorney's request as if it had arisen under Federal Rule of Civil Procedure 26 (b) (R. 550). This Rule is set out in Appendix, *infra*, page 20. Aside from the matter of privilege, the only restriction imposed by Rule 26 (b) is that the matter be relevant to the subject matter. The Rule provides no basis for requiring that the instrument sought to be inspected be before the court so that it can determine whether the instrument will serve as a basis for impeachment and whether such impeachment will materially affect the jury's verdict. For the Circuit Court of Appeals to hold that demand and inspection by defendants' attorney would not make the statement admissible for the plaintiff, but then refuse to set aside the verdict because the statement failed to satisfy an additional requirement imposed by the Court, is a denial of a right given by Rule 26 (b). Furthermore, that Rule relates primarily to the examination of witnesses. At the time of the ruling by the trial court the attorney for defendants was demanding, and asking for the right of inspection of, a document, and was not examining a witness on that document.

The conditions imposed by the Circuit Court of Appeals are contrary to the intent and spirit and purpose of other

Federal Rules of Civil Procedure, particularly Rules 34 and 45 (b) (set out in Appendix, *infra*, pp. 20-21). Under Rule 34, the court, upon motion and notice, may order any party to produce and permit the inspection of any designated documents, papers, books, accounts and letters, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control. Rule 45 (b) provides that a subpoena may also command the person to whom it is directed to produce the books, papers or documents designated therein. The court, upon motion, may quash the subpoena if it is unreasonable and oppressive, or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents. Like Rule 26 (b), these Rules also contain restrictions designed to prevent unreasonable and oppressive inquiry. None of these restrictions, however, supplies a basis for the conditions imposed.

In not treating this admitted error as a ground for reversal the Circuit Court of Appeals failed to give consideration to another aspect of the question—whether the situation was covered by the Federal Rules or by the Conformity Act (R. S. §914, 28 U. S. C. A. §724; set out in Appendix, *infra*, p. 21). The Conformity Act would require the adoption of the New York rule as to inspection of documents. *Smith v. Rentz*, 131 N. Y. 169 (1892) allows unqualified right of inspection, free from any such conditions as have been imposed either by the trial court or by the Circuit Court of Appeals. While this Court in *Sibbach v. Wilson & Co.*, 312 U. S. 1, *supra*, a case concerning the validity of Rule 35 of the Federal Rules of Civil Procedure, said that the Rules repealed the Conformity Act (see page 10, opinion of Mr. Justice Roberts), the question still persists whether that Act has been entirely super-

seded, or whether a remnant remains when not in conflict with the Rules. See "The Admissibility of Evidence under the Federal Rules" by Thomas F. Green, Jr., 55 Harvard Law Review 197, 204 (1941).

These questions are important. They involve the scope of the Federal Rules of Civil Procedure, particularly 26 (b), 34, and 45 (b). It is important to know whether the new Rules cover the entire field of civil procedure, or whether the Conformity Act is still applicable to certain situations. It is clear that these questions will arise in many trials of civil cases in the federal courts and will result in confusion of treatment unless this Court makes a definite ruling on the issues presented.

4. The decision of the Circuit Court of Appeals for the Second Circuit, that the burden of proving contributory negligence was on the defendants, is in conflict with the decisions of the Circuit Courts of Appeals for the First and Eighth Circuits.

The decision of the Circuit Court of Appeals is to the effect that because of Rule 8 (c) (set out in Appendix, *infra*, pp. 19-20), or because of the decisions of the New York courts, including those relating to conflict of laws, the trial court was correct in charging that the burden of proving contributory negligence was on the defendants (R. 552).

Defendants urge that Rule 8 (c) has no application as it relates to pleading and not to proof, and as federal courts treat burden of proof as a matter of substance which cannot be altered by court rule; that New York courts, on the other hand, treat burden of proof as a matter of procedure; that under New York decisions as to conflict of laws, New York would apply its own law, and not that of Massachusetts; that under New York law the burden of proving freedom from contributory negligence, in a personal injury action, is on the plaintiff.

The escape method of treatment in the majority opinion (admitted in note 65, R. 552) is not sound. This case involves consideration both of Rule 8 (e) and of New York law. To reach what we contend was a wrong result, the opinion refuses to pass upon Rule 8 (e) and misinterprets the New York law.

In not holding that Rule 8 (e) refers only to pleading the decision is in conflict with *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1, 1940), certiorari denied 310 U. S. 650, and with *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C. C. A. 8, 1941). While Circuit Judge Magruder, in *Sampson v. Channell*, *supra*, might have reached the same result in the particular case by reliance upon Rule 8 (e), his opinion says that the Rule contains no prescription as to burden of proof and the court must look elsewhere for the answer (110 F. (2d) 754 at page 757). In *Fort Dodge Hotel Co. v. Bartelt*, *supra*, the cause of action for injuries arose in Iowa and the case was tried in the federal court in that state. Under the law of Iowa proof of freedom from contributory negligence was an essential element of the cause of action and the court refused to apply Rule 8 (e).

In not definitely holding that the trial court should have been governed by the conflict of laws rule of New York, which treats burden of proof as procedural, the decision is again in conflict with *Sampson v. Channell*, *supra*. In that case the action was brought in a federal court for Massachusetts for injuries sustained in Maine. Circuit Judge Magruder says that Massachusetts treats burden of proof as a matter of procedure only but, as we have pointed out, he refused to rely on Rule 8 (e) and looked to the conflict of laws rule of Massachusetts.

We submit that the opinion of Circuit Judge Frank in the present case misinterprets *Fitzpatrick v. Interna-*

tional Ry. Co., 252 N. Y. 127 (1929). In that case the Court of Appeals dealt with the application of a foreign-created right and did not concern itself with a question of remedy. Plaintiff's right to recover was based solely on the Ontario Contributory Negligence Act (set out in Appendix, *infra*, p. 22). By New York law, there is no recovery for a plaintiff in a personal injury action who is guilty of contributory negligence. The distinction is recognized by Circuit Judge Magruder in *Sampson v. Channell*, *supra* (note 2, p. 755). In *Wright v. Palmison*, 237 App. Div. 22 (2nd Dept., 1932), a personal injury case arose out of an accident in Massachusetts and the per curiam opinion applies the New York rule as to proof of freedom from contributory negligence. See also *Clark v. Harnischfeger*, 238 App. Div. 493 (2nd Dept., 1933), a personal injury action arising out of an accident in Pennsylvania, where the court said (p. 495):

"At any rate, the question of burden of proof of freedom from contributory negligence is a rule of evidence and provable according to the law applicable in the State of New York. (*Sackheim v. Pigueron*, 215 N. Y. 62; *Wright v. Palmison*, 237 App. Div. 22)."

5. *The decision of the Circuit Court of Appeals that the burden of proving contributory negligence was on the defendants presents important questions of federal law which have not been, but should be, determined by this Court.*

Circuit Judge Frank thought it was matter of indifference whether Rule 8 (c) or the New York conflict of laws rule applied (R. 552). The opinion of the Circuit Court of Appeals in *Griffin v. McCoach*, 116 F. (2d) 261, 264 (C. C. A. 5) said that it was immaterial, insofar as the decision of the case was concerned, whether the law of Texas or the law of New York was applied. This Court thought otherwise. 313 U. S. 498 (1941).

We have stated the main question to be, whether in diversity of citizenship cases the federal courts must follow the conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8 (c). There are several subsidiary questions involved. Is Federal Rule 8 (c) a rule of procedure or substance? Is it limited to pleading only? If a rule of substance, is it within the authority granted by Congress? If it is a rule of substance and within the authority granted by Congress, is it independent of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938)? Is the matter of burden of proof of contributory negligence a matter of substantive law within the Rules of Decision Act (R. S. §721; 28 U. S. C. A. §725; set out in Appendix, *infra*, p. 22)? Does the problem here presented fall within the substantive sphere of the *Tompkins* case, or within the procedural sphere of the Federal Rules? In a diversity of citizenship case, is the federal court to follow the state conflict of laws rules where the state treats the matter of burden of proof of contributory negligence as procedural? These are important, everpresent questions. As Circuit Judge Magruder says in *Sampson v. Channell, supra*, "Until the point is finally ruled upon by the Supreme Court, lower courts must piece out as best they can the implications of the *Tompkins* case" (pp. 760, 761). The exact difficulty here presented was recognized as unsolved by Circuit Judge Goodrich in *Boyle v. Ward*, 125 F. (2d) 672 (C. C. A. 3, 1942; note 8, at p. 675). "With respect to the burden of proof a sharp conflict between *Erie Railroad v. Tompkins* and the Federal Rules has developed." 38 Columbia Law Review 1472, 1478 (1938).

This Court has not decided these questions. In *Erie R. Co. v. Tompkins*, 304 U. S. 64, *supra*, it was held that in diversity actions at law, the federal court must apply

the substantive law of the state, where the matter involves general common law. In *Cities Service Co. v. Duslap*, 308 U. S. 208 (1939), this Court merely determined that burden of proof as to legal title in an equity suit related to a substantial right, and applied the local rule. In *Sibback v. Wilson & Co.*, 312 U. S. 1, *supra*, this Court concluded that the Enabling Act of June 19, 1934 (c. 651, 48 Stat. 1064; 28 U. S. C. A. §723 b, c; set out in Appendix, *infra*, p. 19) was restricted to matters of pleading and court practice and procedure (p. 10), that Rules 35 and 37 regulate procedure (p. 14), and that the word "substantive" in the Act is not the equivalent of "important" or "substantial" (p. 11). In *Klaxon Co. v. Stetson Electric Mfg. Co.*, 313 U. S. 487 (1941), the principle of the *Tompkins* case was applied to include the forum's conflict of laws rules. *Griffis v. McCouch*, 313 U. S. 498, *supra*, applied the *Klaxon* principle to a new set of facts. *D'Onesch, Dahme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. —, 86 L. ed. Advance Opinion 642, decided March 2, 1942, involved a federal, not a state question; and the *Klaxon* case was not applicable.

In the last analysis, considerations of policy are involved which should be passed upon by this Court. There is clear public importance in the administration of the Federal Rules of Civil Procedure, including Rule 8 (e).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix.

STATUTES INVOLVED.

Enabling Act of June 19, 1934, c. 651, §§1, 2; 48 Stat. 1064; 28 U. S. C. A. §723 b, c, reads as follows:

"Be it enacted • • • That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the form of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"See. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

Rule 8 (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following §723 (c), reads as follows:

"AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge

in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, licensee, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 26 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following §723 (c), reads as follows:

"**SCOPE OF EXAMINATION.** Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge or relevant facts."

Rule 34 of the Federal Rules of Civil Procedure, 28 U. S. C. A., following §723 (c), reads as follows:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or

control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Rule 45 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following §723 (e), reads as follows:

"**FOR PRODUCTION OF DOCUMENTARY EVIDENCE.** A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents."

Conformity Act, R. S. §914; 28 U. S. C. A. §724, reads as follows:

"**CONFORMITY TO PRACTICE IN STATE COURTS.** The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

Rules of Decision Act, R. S. §721; 28 U. S. C. A. §725, reads as follows:

"LAWS OF STATES AS RULES OF DECISION. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law; in the courts of the United States, in cases where they apply."

Ontario Contributory Negligence Act, Chapter 32 of the Laws of Ontario, 1924, reads as follows:

"3. In any action or counterclaim for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:

"First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

"Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

"4. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained."

